INTERIOR BOARD OF INDIAN APPEALS

Iowa Tribe of Oklahoma v. Acting Director, Bureau of Indian Affairs,
Office of Tribal Services

26 IBIA 181 (08/12/1994)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

IOWA TRIBE OF OKLAHOMA, Appellant	:	Order Affirming Decision
v.	:	Docket No. IBIA 94-88-A
ACTING DIRECTOR, OFFICE OF TRIBAL SERVICES, BUREAU OF INDIAN AFFAIRS, Appellee	:	August 12, 1994

Appellant Iowa Tribe of Oklahoma seeks review of a February 23, 1994, decision of the Acting Director, Office of Tribal Services, Bureau of Indian Affairs (Director; BIA), denying appellant's application for a FY 1994 Special Tribal Court grant. For the reasons discussed below, the Board affirms the Director's decision.

Appellant filed a timely application for a FY 1994 Special Tribal Court grant pursuant to an announcement published in the Federal Register. 58 FR 53374 (Oct. 14, 1993). On February 23, 1994, the Director denied appellant's application, stating:

> The grant application received a score of 47, out of a possible score of 100. Only those applicants receiving scores of 70, or above, were awarded grants. The application was reviewed using the Evaluation Criteria set forth in Part IV G of the notice of the availability of FY 1994 Special Tribal Court funds. * * *.
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> Review Panel Summary - Weaknesses. The application did not provide data to justify the needs cited in the objectives. The request for funding to continue a routine staff position is not justified. The need for an intermediate appellate court was not established. The application indicates there "might be cases on appeal." It may be more cost effective to appeal directly to the Tribal Supreme Court. The small case load does not justify the planned expansion. There is no methodology for the measurement of performance or benefits to the community.

(Director's Feb. 23, 1994, Decision at 1-2).

On appeal to the Board, appellant contends that it was denied due process because its application was reviewed by a panel of two reviewers, rather than three as promised in the Federal Register announcement.

Appellant also objects to the review panel's summary of the weaknesses of its application, contending, inter alia, that the summarized statements are inconsistent and vague.

The Federal Register announcement of the Special Tribal Court program stated at Part IV G: "Applications will be evaluated by a review panel of at least three individuals. Review panels may be composed of Federal personnel working with tribal judiciaries and tribal judges or judicial personnel selected by the area directors." 1/ The Director concedes that appellant's application was reviewed by a panel of two. She contends, however, that the decision to proceed with a panel of two was, under the circumstances at hand, justified and reasonable.

The record indicates that the reviewers, who came from various parts of the country, assembled during the week of January 24-28, 1994, to review the applications. A January 25, 1994, memorandum prepared by the Chief, Branch of Judicial Services, BIA (Chief), states:

> Panelists were convened January 24. Three panelists failed to attend the briefing Monday afternoon. The Muskogee Area panelist was delayed due to weather and arrived Monday p.m. Calls to Juneau Area Office the afternoon of January 24 confirmed that one panelist was delayed and the second experienced a family emergency and would not be able to read.
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> Each panelist has been asked to review and score 11-12 applications, reach consensus with the panel and submit all forms and applications by the afternoon of January 28. I spoke with the panel leaders to determine whether we should proceed with 2 panelists or divide the panel's applications among the remaining 4 panels. The discussion focused on late notice which would preclude us from finding a third reader and each panel having more than enough applications to review. The experienced readers felt consensus scoring would preclude problems and they recommended we proceed with a panel of 2.

(Chief's Jan. 25, 1994, Memorandum at 1).

Appellant contends that

> [t]he Bureau, in making a three-member panel a minimum standard for review, has the duty to ensure all applications are rated accordingly. * * * [T]he Bureau, in making its selections of possible reviewers, should have considered and prepared for any contingencies that could possibly occur in this type of situation.

(Appellant's Reply Brief at 2).

1/ Part IV H stated: "Tribal judges or judicial personnel wishing to volunteer, on a non-reimbursable basis, to serve as reviewers should submit a letter of interest and vitae to their respective Bureau of Indian Affairs Area Director."

The Board has held that BIA has a duty to give fair and equitable consideration to all grant applications. See, e.g., Ak-Chin Indian Community v. Acting Director, Office of Tribal Services, 26 IBIA 174 (1994). This means, inter alia, that all applications must be rated under the same standards and, as nearly as possible, under the same conditions. 2/ Further, in order to minimize the effects of subjectivity, it is preferable to have a number of people participate in the rating. E.g., Kawerak, Inc. v. Acting Juneau Area Director, 24 IBIA 194 (1993). Where an application is rated by three reviewers, rather than only one or two, the likelihood of achieving a balanced rating is increased.

Clearly, BIA intended to provide panels of three, as it announced in the Federal Register notice. And, having so announced, BIA was under an obligation to provide three-member panels if at all possible. But the provision of three-member review panels is not the only, or necessarily the most inportant, factor in ensuring that grant applications are given fair and equitable consideration. Also important, for instance, is the qualification of the reviewers and their familiarity with the kinds of programs for which grant funds are sought. When such qualified individuals serve as reviewers, the prospects of achieving fair and equitable ratings are enhanced. In this case, BIA committed itself in the Federal Register notice, not only to provide three-member panels, but also to provide panels of individuals experienced in judicial matters.

In January 1994, BTA was faced with an emergency. There were evidently no qualified persons immediately available to replace the missing panelist. BIA could perhaps have located a less qualified person to fill in. Had it done so, however, a question could well have arisen as to whether a three-member panel which included such a person could provide ratings of the same caliber as those of the other panels, or even as those of a two-member panel of qualified individuals. Alternatively, as the Chief discussed in her January 25 memorandum, BIA might have chosen to ask the other panelists to review additional applications. It appears possible, however, that this approach would have resulted in less thorough reviews of all applications because the other panelists already had a full workload.

In determining how best to fulfill its responsibility to provide fair and equitable consideration to the grant applications, BIA was required to weigh the alternatives available to it in the emergency situation at hand. The Board cannot conclude that BIA's choice was unreasonable under the circumtances. 3/

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2/ It also means, as stated in Ak-Chin Indian Community that the Board cannot consider new information on appeal, i.e., information not submitted with a tribe's original application, because to do so would give that tribe an opportunity not enjoyed by other grant applicants. Thus, in this case, the Board cannot consider the new information appellant submits concerning the caseload of its court.

3/ Appellant contends that BIA should have made provisions for any contingencies that might occur, but does not state what provisions it should have made. One could perhaps argue that, in order to prevent the kind of emer-

However, even if BIA was not under an absolute obligation to provide three-member panels, it is conceivable that, in the particular circumstances here, appellant's application failed to receive fair and equitable consideration because only two panelists reviewed it.

Appellant contends that its application might have received a higher rating had a third person reviewed it. The Director responds that appellant's application could not have received a rating of 70 even if a third panelist had given it a score of 100. The two panelists who rated appellant's application gave it scores of 42 and 52. Accordingly, had a third panelist rated the application at 100, appellant's averaged score would have been 64.67, still considerably below the cut-off score of 70.

The Director states that the panel evaluation rules required that a panel reach a consensus within 15 points, and further required that a new panel rate the application if the first panel could not reach a consensus to that extent. Appellant contends that it is possible a third panel member could have convinced the other two to raise their ratings enough to give appellant a score of 70. In a similar vein, it is possible that a third person could have disagreed strongly enough with the other two to have prevented a consensus within 15 points, thereby causing a new panel to rate the application. If a new panel had reviewed appellant's application, it is possible that it would have given the application a score of 70.

The Board considers these to be extremely remote possibilities. The comments of the two reviewers evidence serious problem with appellant's application. Upon review of appellant's application and the panelists' comments, the Board finds that the comments are reasonable. It is virtually inconceivable that a third reviewer, experienced in judicial matters, would have rated appellant's application high enough to raise appellant's score to 70, even under BIA's consensus requirements. The Board therefore concludes that appellant's application would not have been approved even if a third reviewer had been appointed. 4/

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fn. 3 (continued)
gency that occurred in this case, BIA should have arranged for alternate reviewers to attend the rating session. But this would have added to the administrative cost of the program and thus might have reduced the amount of funds available to be awarded as grants. BIA's decisions concerning the amount of funds to allocate to the administration of its discretionary grant programs is not a matter this Board would normally review. Cf. Kawerak, Inc., and cases cited therein. Thus, the Board's role here is to determine whether BIA acted reasonably in the emergency circumstances with which it was presented.

4/ Under other circumstances, the Board might find that a third panelist should have been called upon to review appellant's application. Such a circumstance might exist, for instance, if the scores given by the two panelists had been close to 70, making it possible for a third score to have raised appellant's average score to 70.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Director's February 23, 1994, decision is affirmed. 5/

//original signed
Anita Vogt
Administrative Judge

//original signed
Kathryn A. Lynn
Chief Administrative Judge

5/ As indicated above, appellant contended that the summary of weaknesses given in the Director's decision was vague. Although the summary is adequate to give appellant a basic idea of its weaknesses, it may not be detailed enough to provide appellant with guidance for improving its applications in the future, particularly in view of the fact that appellant has only recently established its court system and so lacks experience in judicial matters. The Board therefore recommends that BIA either provide appellant with copies of the detailed comments of the reviewers, with the reviewers' names removed, or otherwise provide appellant with counseling in this regard.